SERVED: September 29, 2004

NTSB Order No. EA-5113

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of September, 2004

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. CARLO J. OCAMPO, Respondent.	)	Docket SE-16900

OPINION AND ORDER

Respondent has appealed from an order issued by Administrative Law Judge William E. Fowler, Jr., on September 15, 2003, granting the Administrator's motion for judgment on the pleadings and terminating the proceeding.[1] We grant the appeal and remand the case for a hearing on the merits.

On May 20, 2003, the Administrator issued an order

[1] A copy of the order is attached.

suspending[2] respondent's pilot certificate for alleged violations of 14 *Code of Federal Regulations* 91.123(b) and 91.13(a).[3] Specifically, the order alleged that on December 28, 2002, respondent was the pilot in command of an instructional flight that taxied onto runway 31 at Morristown Municipal Airport in Morristown, New Jersey, when another aircraft was approaching to land on that runway, contrary to an air traffic control instruction to hold short of runway 31.

Respondent appealed the order in a facsimile dated May 21, 2003, that was received at the Safety Board's Office of Administrative Law Judges on May 28, 2003. The appeal, which was titled "Memorandum for the Office of Administrative Law Judges," stated, in part (emphasis in original):

> ...the accused requests an **appeal** by reason of the following:
>
> 1. [the airplane] was already holding short of Runway 31, in accordance to Morristown Ground Control's instruction prior to incident of accusation of runway incursion.
>
> 2. Both the instructor and student (Mr. Laercio DoCarmo), both understood (heard) Air Traffic Control instruct [the airplane] to **position and hold on Runway 31** on Morristown

[2] The order included a waiver of penalty because of respondent's timely filing of a report under NASA's Aviation Safety Reporting Program.

[3] Section 91.123(b) prohibits, except in an emergency, operation of an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised. Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Airport.

3. Both instructor and student operated the aircraft in accordance to Air Traffic Control instruction. Both the instructor and student DID NOT operate the aircraft in a careless and reckless manner. The alleged aircraft on final was not visible.

4. After informed of the alleged incident, both instructor and student were denied (declined) the opportunity to attend a replay of the audio tape records of the incident by a FAA Morristown Airport's Air Traffic Control's female supervisor.

On May 30, 2003, the Administrator filed the order of suspension as her complaint. Respondent received the complaint by certified mail on June 5, 2003. On June 6, 2003, the Case Manager in the Office of Administrative Law Judges sent respondent a copy of the Board's rules of practice (49 C.F.R. Part 821) and a letter informing respondent of, among other things, the requirement to file an answer to the Administrator's complaint within 20 days of the complaint's service upon him. Specifically, that letter stated:

> Failure to file an answer with the Board, responding to each allegation in the Order/Complaint may be deemed an admission of the charge or charges not answered. Therefore, the filing of a timely answer is a very important step in the protection of your rights.

Respondent did not thereafter file an answer. On July 3, 2003, the Administrator filed a motion for judgment on the pleadings based on respondent's failure to file an answer within 20 days of the complaint (i.e., by June 19, 2003). The Administrator's motion was based on section 821.31(b) of the

Board's rules, which states that the "[f]ailure to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the allegation or allegations not answered." Respondent thereafter (on July 8, 2003) filed an answer in which he made essentially the same assertions contained in his May 28 appeal, and a response contesting the Administrator's motion for judgment on the pleadings, in which he asserted he could not afford legal representation and was "not aware of the mandatory timely response required by regulations." On the same day (July 8, 2003), respondent also had a telephone discussion with a staff member from the Office of Administrative Law Judges, during which, according to the staff member's notes, he explained that his answer was late, "because he was unclear on what he had to do and thought his appeal answered everything."[4]

By order dated September 15, 2003, the law judge granted the Administrator's motion, citing the Board's rule and the Case Manager's letter. The law judge noted that respondent's explanation for the lateness of his July 8 answer, as set forth in his reply to the Administrator's motion, did not constitute good cause for respondent's failure to submit his answer before the June 19 deadline. The law judge's order made no mention of the contents of respondent's May 28 appeal, or of the statement respondent made during his July 8 telephone call indicating that

[4] The staff member's notes are recorded on a document titled, "Memo to the Docket File," dated July 8, 2003, and is part of the official file of this case.

he thought his appeal "answered everything."

On appeal, respondent points out that his May 28 appeal document responded factually to the allegations in the Administrator's order/complaint and, therefore, "functioned precisely as an answer would have functioned."[5] We agree.[6]

We do not disagree with the law judge's premise that lack of legal counsel and confusion regarding our procedural filing requirements do not constitute good cause for an untimely filing. However, we do not view that as the issue in this case. We think the operative question is not whether respondent demonstrated good cause for his late-filed (July 8) answer, but, rather, whether it can fairly be said that respondent failed to file a timely answer in the first place. In his notice of appeal respondent clearly denied the Administrator's allegation that he violated an air traffic control instruction to hold short of runway 31 by asserting that he and his student both understood the air traffic control instruction to be "position and hold," not "hold short." We think this notice of appeal was more than adequate to inform the law judge and the FAA that respondent was

[5] The Administrator has filed a reply brief.

[6] Respondent makes several other points in support of his appeal, including that the law judge abused his discretion in granting the Administrator's motion based on a procedural error by a pro se respondent, and that the Board has a long-standing policy of disposing of cases on the merits, particularly where respondents are appearing pro se. Although the Board did at one time have a preference for deciding cases on the merits, the cases in which this preference was expressed are now several decades old. The policy has not been followed since the Board's decision on remand from the Court of Appeals in Administrator v.

(continued…)

contesting the factual basis for the charges and it was, therefore, the functional equivalent of an answer.

We have reviewed our prior cases (including those cited in the Administrator's brief) in which a respondent's failure, absent good cause, to file a timely answer has resulted in judgment on the pleadings or hearings limited to sanction.[7] However, in none of these cases is there any indication that the respondent submitted a timely, specific rebuttal of the Administrator's allegations, such as occurred in this case. Therefore, our decision in this case does not contradict that precedent.

As we noted in Administrator v. Blaesing, 7 NTSB 1075 (1991), the intent of our rule requiring an answer is "to ascertain in advance of the hearing the scope and nature of the issues the airman wants to have adjudicated." In this case, respondent's notice of appeal accomplished this purpose. Cf. Administrator v. Fekete, NTSB Order No. EA-4236 (1994) (respondent's notice of appeal treated as his appeal brief where it contained sufficient explanation to be susceptible to reasoned rebuttal).

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(continued…)
Hooper, 6 NTSB 559 (1988).

[7] See Administrator v. Diaz, NTSB Order No. EA-4990 (2002); Administrator v. McLarty, NTSB Order No. EA-3760 (1993); Administrator v. Sutton, 7 NTSB 1282 (1991); Administrator v. Blaeson, 7 NTSB 1075 (1991); and Administrator v. Sanderson, 6 NTSB 748 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;

2. The law judge's order terminating the proceeding is vacated; and

3. The case is remanded to the law judge for a hearing on the merits.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.